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Supreme Court of the United States

October Term, 1974

No. 74-425

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 18, AFL-CIO,
Petitioner,

vs.

THE DAYTON POWER & LIGHT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statute Involved 2
Statement of the Case 3
Reasons for Granting Writ 7

APPENDIX:

Opinion of the Court of Appeals 13
Judgment of the Court of Appeals 16
Opinion of the District Court 17

TABLE OF AUTHORITIES

Cases

Atkinson v. Sinclair Refining Company, 370 U.S. 258 (1962) 10

Gateway Coal Company v. Mine Workers, 414 U.S. 368 (1974) 10

International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, 406 U.S. 487 (1972) ..7, 8, 9, 10

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960) 10

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 10

United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960) 7, 8, 9, 10

Statute

Labor Management Relations Act, Sec. 301(a), 29 USC §185 (a)) 2, 7

28 USC §1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

International Union of Operating Engineers, Local No. 18, AFL-CIO petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at ..... F.2d ....., No. 73-1905, 86 LRRM 3136. A copy of the Court of Appeals Decision appears in the attached Appendix at page 13. The Opinion of the United States District Court for the Southern District of Ohio is set forth at p. 17, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 18, 1974 (p. 16, *infra*). Jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that Respondent was not required, under the terms of a labor agreement, to submit Petitioner's grievance to binding arbitration.

2. Whether the Court of Appeals erred in considering substantive aspects of Petitioner's grievance in reaching its Decision.

STATUTE INVOLVED

This case is based on Section 301(a) of the Labor Management Relations Act (29 USC §185(a)) which provides:

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner submits that by denying arbitration of its grievances under a labor agreement, the Sixth Circuit clearly deviated from applicable decision of this Court. Furthermore, since Petitioner had never been given a hearing, the "facts" upon which the Sixth Circuit so heavily relied were not only unsubstantiated, but erroneous. The results of these compounded errors amount to a serious departure from well-established national policy favoring the peaceful settlement of labor disputes through binding arbitration.

The Court of Appeals correctly ruled that Respondent, hereinafter referred to as "Dayton," is one of the owners of the J. M. Stuart Electric Generating Station located on the Ohio River in Adams County, Ohio (p. 14, *infra*). Petitioner, hereinafter referred to as "Operating Engineers," was one of the craft unions that supplied construction employees to this project.

Although Dayton denied that it was "constructing" the Stuart station, it acknowledged that it "is responsible for the construction and operation" thereof (A. 18).[1] On July 11, 1967, Dayton, through its agent Maxon Construction Co., admittedly executed a "Memorandum of Understanding" with the South Central Ohio Building and Construction Trades Council, of which the Operating Engineers are a constituent member (A. 3, 5, 9). For the unions working on the project, the crucial portion of the Memorandum of Understanding was the following paragraph:

> "1. Except as provided below, *the provisions of the various craft agreements* presently prevailing in the area in which the project is located, as renewed or extended through process of negotiation between the

1. All citations preceded by "A." are to pages of the Appendix filed with the Court of Appeals.

parties thereto, *shall govern all building construction work at the project site.*" (Emphasis added).

The Court of Appeals dismissed the foregoing commitment by Dayton as mere "pay rate concessions." (p. 14, *infra*). The "provisions" of the Operating Engineers' "craft agreement" contained not only rates of pay but also the requirement that employees be referred from the union hiring hall, and a well-defined grievance procedure.

The basis for the Operating Engineers' grievance was Dayton's utilization of two non-union subcontractors on the J. M. Stuart project. First, Dayton contracted the excavation of an ash pit to Henson Trucking Company. This was in 1972. Then in January, 1973, Dayton contracted other work at the Stuart station to Underground Ecology, Inc. (A. 8). Although Operating Engineers alleged that these two companies failed to comply with the "craft agreement prevailing in the area,"[2] as required by the aforesaid "Memorandum of Agreement," Dayton claimed that it was "without knowledge" of its two subcontractors' refusal to adhere to the craft agreement (A. 9).

Operating Engineers alleged and Dayton denied that a grievance was filed protesting Dayton's subcontracting of work to Henson Trucking Company and Underground Ecology, Inc. (A. 4, 9). Nevertheless, it is clear that this case would not have arisen had Dayton been willing to arbitrate the dispute.

The Ohio State Building Construction Agreement with which, according to the allegations of the Operating

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2. Since May 1, 1970, the "craft agreement" for operating engineers performing building construction work has been the "Ohio State Building Construction Agreement" entered into by Operating Engineers and the Associated Contractors of Ohio, Inc.

Engineers, Dayton agreed to comply in the first paragraph of the aforesaid Memorandum of Understanding, provides for the resolution of disputes in the following manner:

"In the event *any differences of opinion or any grievances concerning interpretation of the Agreement* arise during the term of this Agreement, an earnest effort shall be made to settle the differences or grievances in the following manner:

Step 1: The District Business Representative shall meet with the Employer representative and attempt to settle the matter. If no settlement can be reached; then

Step 2: The difference or grievance shall be referred to a committee consisting of two (2) members, one to be named by the Associated Contractors of Ohio, Inc. and one to be named by Local Union No. 18 of the International Union of Operating Engineers. If no settlement is reached at this step; then

Step 3: The difference of opinion or grievance may be referred to a State Joint Committee consisting of six (6) members, three (3) to be appointed by the Associated Contractors of Ohio, Inc., and three (3) to be appointed by Local Union No. 18 of the International Union of Operating Engineers. If no settlement is reached at Step 3; then

Step 4: The Grievance shall then be referred to an Arbitrator selected by the Committee referred to in Step 3. If no agreement is reached by the State Joint Committee on the naming of an Arbitrator, then the Rules of The American Arbitration Association for selecting an Arbitrator shall apply. Decision of the Arbitrator shall be final and binding on all parties." (Emphasis added).

The same Agreement also provides:

> "It is agreed that all subcontractors shall be subject to the terms and provisions of this Agreement."

Although it found that Dayton was obligated to follow the Memorandum of Agreement (p. 15, *infra*), the Court of Appeals, after dismissing paragraph 1 thereof as "pay rate concessions," completely ignored the other implications thereof. Instead, it chose to concentrate on paragraph 3 of the Memorandum, which governed "dispute settlement." (p. 14, *infra*).[3] The Court of Appeals made factual determinations and engaged in contractual interpretation not permissible under the national labor policy established by this Court. Thus, although there had been no evidentiary hearing, the Court of Appeals concluded that Dayton was not a "contractor" within the meaning of paragraph 3 of the Memorandum of Understanding and therefore in no way bound to arbitrate grievances with Operating Engineers. And although the Operating Engineers offered to prove otherwise, the Court of Appeals ruled that Dayton "employed no craft union members at Stuart station or otherwise." (p. 15, *infra*). Even assuming *arguendo* that factual determinations were warranted, they would still apply solely to the possible coverage of paragraph 3.

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3. "3. In consideration of the concessions enumerated above, all crafts pledge that there will be no strikes (other than area-wide strikes during contract renewal negotiations), walkouts, or work slow-downs during the life of the project. All crafts agree to accept jurisdictional work assignments as made by the various contractors and to process any disputes therewith as provided in the Procedural Rules and Regulations of the National Joint Board for Settlement of Jurisdictional Disputes, As Amended. (In this connection, it is understood that the various contractors will also conduct themselves in accordance with said Procedural Rules and Regulations.) It is agreed that any grievance between local union(s) and contractor(s) shall be settled in accordance with the grievance machinery provided in the craft agreement(s) or, if none is so provided, by arbitration." (A. 5-6)

REASONS FOR GRANTING WRIT

The Operating Engineers submit that the action of the Court of Appeals deviated from the clearly enunciated national labor policy of this Court in two ways. First, the Court of Appeals failed to properly construe paragraph 1 of the Memorandum as an agreement by the parties to arbitrate. Secondly, the Court of Appeals, by considering the substantive question of whether or not Dayton was a "contractor," injected itself into an area historically set aside for the arbitrator.

In conjunction with its view that labor disputes are best settled by arbitration, this Court has granted very narrow jurisdiction for Federal courts in cases dealing with the resolution of labor disputes. When presented with a suit brought to compel arbitration pursuant to Section 301 of the Labor Management Relations Act (29 USC §185), federal court jurisdiction is strictly limited. *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), holds:

> ". . . the judicial inquiry under §301 must be *strictly confined* to the question whether the reluctant party did agree to arbitrate the grievance. . . ." 363 US 574, 582 (Emphasis added).

By virtue of its error of omission relating to paragraph 1 of the Memorandum, the Court of Appeals failed to address the one question properly before it.

Recently this Court issued its decision and opinion in *International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders*, 406 U.S. 487 (1972). *Flair* dealt with a factual situation strikingly similar to the instant case. Based on the facts of *Flair*, this Court unequivocally compelled the parties to arbitrate their disputes.

There as here, the union and employer entered into a Memorandum of Agreement. Again, as in this case, the Memorandum of Agreement fully incorporated the terms of the master labor agreement for the area. The applicable master agreement included a provision requiring arbitration of disputes. Arbitration was expressly extended to "any differences" between the parties.

In *Flair* the Court held that the company had agreed to a "broad [arbitration] clause." There is no material difference between the facts relied on by this Court in *Flair* and the facts herein. The express purpose of paragraph 1 of the instant Memorandum of Agreement is to incorporate all terms and conditions of the Operating Engineers' local master agreement. Like the master agreement in *Flair*, the instant master agreement calls for arbitration of "any differences of opinion." Yet, despite these dispositive similarities, neither the Court of Appeals nor District Court could cite any reason for failing to rely on *Fair*. The only reason for this oversight was both courts' failure to consider paragraph 1 of the Memorandum in its proper perspective. Rather than view paragraph 1 as a complete adoption of an entire collective bargaining agreement, the Court of Appeals dismissed paragraph 1 as being simply "pay rate concessions." (p. 14, *infra*).

These errors relating to paragraph 1 of the Memorandum are sufficient to warrant the granting of certiorari. Under the rule of *Warrior and Gulf*, once a federal court has found that the parties have agreed to an arbitration clause all further aspects of their dispute must be referred to the arbitrator. Moreover, the Court of Appeals' handling of paragraph 3 of the Memorandum also constituted reversible error. Again, the Court of Appeals misused its narrow jurisdictional mandate. The error as it relates to paragraph 3 is one of commission. In "resolving" the question

of whether Dayton was a "contractor" both lower courts disregarded their well-established obligation to "strictly confine" their inquiry to whether or not the parties had agreed to arbitrate. *Warrior and Gulf, supra.*

Further consideration of the *Flair* decision also exemplifies the lower courts' deviation from the precedent and policy set by this Court. The employer in *Flair* claimed that laches on the part of the union precluded arbitration. This defense was first raised before the district court. That court considered the merits of the laches claim. Finding the laches claim meritorious, the District Court refused to compel arbitration.

On appeal a divided Seventh Circuit Court affirmed the lower court ruling. The appellate court characterized the laches defense as "extrinsic" to the contractual arbitration provisions. Resolution of such "extrinsic" considerations was held to be within federal courts' jurisdiction under Sec. 301.

The Court disagreed with the analysis proffered by the Seventh Circuit in *Flair*. Because of the broad scope of the arbitration clause, this Court concluded that even "extrinsic" considerations must be referred to the arbitrator. The wording of the arbitration clause contained:

> ". . . nothing to limit the sweep of this language to except any dispute *or class of disputes* from arbitration." (Emphasis added) 406 US 487, 491.

In this case the Sixth Circuit Court of Appeals and the District Court have tried to exclude a "class of dispute" from arbitration. This exclusion is attempted in the fact of the language of paragraph 3 of the instant Memorandum which refers "any grievance" to arbitration. Nothing in paragraph 3 qualifies or limits the types of grievances which must go to the arbitrator. Thus, the question of

whether or not Dayton is a "contractor" is not a question for the courts to answer. Like the "laches" question in *Flair* the "contractor" question herein is a dispute between the parties to a labor agreement. Being a dispute, it is subject to the parties' contractual obligation to arbitrate. Hence, even this definitional question must be presented to the arbitrator. Further, both lower courts attempted to resolve a factual issue without the benefit of any evidentiary hearing.

Neither of the lower courts even mentioned *Flair* in their opinions. Instead the Court of Appeals relied on *Gateway Coal Company v. Mine Workers*, 414 U.S. 368 (1974), and *Atkinson v. Sinclair Refining Company*, 370 U.S. 258 (1962). Both of these cases are cited as authority for the premise that:

> "The question of whether a party has contracted to arbitrate is for the courts to decide. . . ." (p. 15, *infra*).

Operating Engineers do not quarrel with the above statement as a valid description of the courts' powers. It is however one thing to properly define a jurisdictional grant, but quite another thing to properly apply it. The lower courts here improperly used their jurisdictional powers. On one hand both courts stopped short of finding a contractual agreement to arbitrate; while on the other hand both courts went beyond their finding of an agreement to arbitrate and engaged in contractual interpretation.

Flair is not an isolated decision. It is derived directly from the famous "Steelworkers Triology."[4] The "Steelworkers Triology cases" establish the rule that arbitration

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4. *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

is the primary means of resolving labor disputes. To allow the decision of the Court of Appeals to stand in this case would severely damage the primacy of the arbitrator in labor dispute settlement. This Court has been clear, consistent and concise in establishing the status of the arbitrator *vis a vis* the courts. This Petition for Certiorari should be granted in order that this historical balance be maintained.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

(Decided July 18, 1974)

No. 73-1905

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 18, AFL-CIO,
Plaintiff-Appellant,

vs.

THE DAYTON POWER & LIGHT COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Before PECK and ENGEL, Circuit Judges, and CONTIE*, District Judge.

PER CURIAM: Appellant union instituted this action against the Dayton Power & Light Company (hereinafter "Dayton"), seeking to compel Dayton to submit a grievance to binding arbitration. The grievance involved appellant's allegation that Dayton had violated the terms of a "Memorandum of Understanding" between Dayton and local construction unions. This matter is before us on appeal from the district court's denial of appellant's motion for sum-

*Honorable Leroy J. Contie, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

mary judgment and subsequent entry of an order of dismissal under Rule 56, Fed. R. Civ. P.

Dayton is one of three public utilities which own the J. M. Stuart Electric Generating Station on the Ohio River. Pursuant to agreements among the owners, Dayton has acted for the other two companies in connection with the construction of Stuart Station. The owners further delegated their authority by appointing the Maxon Construction Company as their agent and construction manager on the project. Maxon, in its capacity as agent, executed a "Memorandum of Understanding" with the South Central Ohio Building and Construction Trades Council, of which appellant union is a constituent member. The agreement, which covers all construction work at the project site, provides that in return for certain pay rate concessions the building trade unions will not strike. Dispute settlement is governed by the final clause of the agreement which in pertinent part reads as follows: "It is agreed that any grievance between local union(s) and contractor(s) shall be settled in accordance with the grievance machinery provided in the craft agreement(s) or, if none, is so provided, by arbitration." It was Dayton's refusal to process a grievance filed thereunder that led to the filing of this action. On appeal, appellant urges this Court to reverse the decision of the district court and to order that appellant's grievance be submitted immediately to binding arbitration. For the reasons appearing hereinafter, we decline to so hold.

The sole issue here presented is whether or not the Memorandum obligated Dayton to arbitrate *any* dispute with the South Central Ohio Building and Construction Trades Council or any of its members. Of course, "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his

grievance to arbitration only if he has contracted to do so." *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 85 LRRM 2049, 2051, 42 LW 4095, 4097 (U.S. Jan. 8, 1974). The question of whether a party has contracted to arbitrate is a matter for the courts to decide on the basis of the contract entered into by the parties. *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 50 LRRM 2433 (1962). In the instant case, although clearly a party to the Memorandum, Dayton was a party to it as an owner, not as a contractor. Dayton employed no craft union members at Stuart Station or otherwise and it had no labor-management contract with the appellant. As the district court pointed out, the dispute involved herein is "between Dayton and a labor union—between the owner and the union, as distinguished between [sic] the contractor and a union." The arbitration clause does not constitute an agreement between the owner and the building trade unions working at Stuart Station to arbitrate disputes arising between these parties.

It thus appearing that the unambiguous language of the "Memorandum of Understanding" militates against the position asserted by appellant, we hold that the district court's order dismissing the complaint was correctly entered, and the judgment in favor of Dayton is, therefore, affirmed.

JUDGMENT OF THE COURT OF APPEALS

(Entered July 18, 1974)

No. 73-1905

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 18, AFL-CIO,
Plaintiff-Appellant,

vs.

THE DAYTON POWER & LIGHT COMPANY,
Defendant-Appellee.

JUDGMENT

Appeal from the United States District Court of the Southern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the Judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant, the costs on appeal, as itemized below, in that execution therefor issue out of said District Court.

Entered by order of the Court.

OPINION OF THE DISTRICT COURT

(Filed June 8, 1973)

No. 8715

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 18, AFL-CIO,
Plaintiff,

vs.

THE DAYTON POWER & LIGHT COMPANY,
Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

In 1967, a combination of three utilities as co-owners determined upon and began the construction of what is known as the Stuart Electric Generating Plant at Aberdeen, Ohio. One of the companies, the defendant Dayton Power & Light, acted as the agent for the three owners in matters connected with this construction. It handled the matter generally through a company called "Maxon Construction Company" as the so-called "construction manager." In July, 1967, the construction manager entered into a contract with the South Central Ohio Building and Construction Trades Council. Generally speaking, under the terms of that contract (a copy of which is attached hereto) it was agreed that it would apply to all construc-

tion work on the Stuart Project, that the provisions of the various craft agreements presently prevailing in the area would govern all construction work at the project site, with certain express exceptions. The Building Trades pledged a "no strike" on behalf of its membership unions and their members. And finally, it was agreed that any grievance between local unions "and contractors" shall be settled with the grievance machinery provided in the craft agreements or, if none is so provided, by arbitration.

There is no dispute on the pleadings in this case that Maxon entered into that contract as agent for the defendant Dayton Power & Light and that Dayton Power and Light is a party to that contract in fact and in law to the same effect as though it, rather than Maxon, had signed. That is settled as a matter of pleading in this case and, in addition, two of the undisputed facts are that recently Dayton Power & Light has sought to terminate that contract as though it were a party; in addition, some years ago, Dayton Power & Light brought an action in this Court to enforce the provisions of that contract against one of the locals involved in the construction.

Relatively recently Dayton Power & Light has entered into certain contracts with contractors to do certain work at the Aberdeen location. It would serve no useful purpose to describe the type of work involved. The plaintiff union claims that the work involved is "building construction work at the project site" and the defendant claims it is not. The plaintiff local union has a craft agreement with the type of contractor involved in this type of work, which contains a broad grievance and arbitration clause. It grieved thereunder against the defendant and the defendant refused to process the alleged grievance. That lead to this case—the purpose of which, as is the purpose of plaintiff's motion for summary judgment, is to obtain an

order directing arbitration under the plaintiff's contract with building contractors in the area, or an order to arbitrate under the July, 1967 Memorandum of Understanding.

It is conceded that the defendant Dayton Power & Light has never negotiated a labor-management contract with, nor is it any party to any direct contract with either the plaintiff union (insofar as this case is concerned) or with a Council representative of the plaintiff union (again, for purposes of this case) other than the July, 1967 agreement.

The sole question for this Court is, of course, whether or not a fair construction of the 1967 agreement would lead to the conclusion that the defendant company agreed to arbitrate a dispute with the plaintiff union, the dispute being whether given work was within or without the definition of "building construction work at the Stuart Project." The question is not whether given work is or is not construction work. Of course, if the arbitration clause is applicable, that would be for the arbitrator. The question is whether or not the defendant has agreed to arbitrate such a dispute. Or perhaps more accurately stated—the exact question is whether or not Dayton Power & Light is a "contractor" within that term in the July, 1967 agreement.

The purpose of the Memorandum of Understanding of July 11th may be rather simply stated. Maxon, on behalf of Dayton, contemplated letting a number of contracts and in connection therewith or in advance thereof sought a "no strike" clause from the unions that would be involved, in exchange for Maxon's agreement to see to it that all of the contractors involved would abide by the craft agreements in the contractor's dealings with its employees. As a consequence the Memorandum of

Understanding rather simply dealt with the exceptions to the then craft agreements and then, in one short paragraph, set forth both the "no strike" and the arbitration provisions. Dayton agreed to see to it that any grievance between a local union and these contractors would be settled in accordance with the grievance machinery. Dayton did not agree that any dispute between it and a union with respect to anything would be the subject of any grievance or arbitration proceeding. Stated otherwise, this case does not involve a dispute between a contractor and a labor organization. It involves a dispute between Dayton and a labor union—between the owner and the union, as distinguished between the contractor and a union. We simply cannot find anything in the Memorandum of Understanding which constitutes an agreement between the owner and a union working on the project to arbitrate anything.

The motion for summary judgment is therefore denied.

/s/ TIMOTHY S. HOGAN
United States District Judge

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement of the Case	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

CASES

Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962)	6
Gateway Coal Company v. Mine Workers, 414 U.S. 368 (1974)	6
International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, 406 U.S. 487 (1972)	5
United Steelworkers of America v. Warren and Gulf Navigation Company, 363 U.S. 574 (1960)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-425

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 18, AFL-CIO,

Petitioner,

v.

THE DAYTON POWER AND LIGHT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the opinion of the United States District Court for the Southern District of Ohio are set forth in the Petition.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Respondent agreed pursuant to a Memorandum of Understanding to submit to arbitration any dispute between it and Petitioner.

STATUTE INVOLVED

The pertinent provisions of Section 301 (a) of the Labor Management Relations Act (29 U.S.C. Sec. 185 (a)) are set forth in the Petition at p. 2.

STATEMENT OF THE CASE

The Dayton Power and Light Company (Dayton) is one of three public utilities which own the J. M. Stuart Electric Generating Station (Stuart Station) on the Ohio River (Petition p. 14).[1] Pursuant to agreements between the owners, Dayton has acted for the other two utility companies and is responsible for the construction and operation of Stuart Station (A.[2] pp. 18, 22; Petition p. 14). Dayton employed Maxon Construction Company (Maxon) as construction manager on the project (Petition p. 14). Maxon in its capacity as construction manager and as an agent, entered into a Memorandum of Understanding, dated July 11, 1967, with the South Central Ohio Building and Construction Trades Council, of which Petitioner Union is a constituent member (A. pp. 18, 23; Petition p. 14). The Memorandum of Understanding provides:

> "Memorandum of Understanding
>
> Between Maxon Construction Company, Inc., Construction Manager for the J. M. Stuart Electric Generation Station project on the Ohio River in Adams County, Ohio, representing the Owners of the Station, and the South Central Ohio Building and Construction

[1] All citations preceded by "Petition" are the pages of Petitioner's Petition for a Writ of Certiorari filed with this Court.

[2] All citations preceded by "A." are to pages of the Appendix filed with the Court of Appeals.

Trades Council, representing all craft local unions having jurisdiction over building construction work at the site of said project.

This understanding applies to all building construction work on the above project. Its provisions shall be effective on July 17, 1967 and shall remain in effect through completion of the project.

1. Except as provided below, the provisions of the various craft agreements presently prevailing in the area in which the project is located, as renewed or extended through due process of negotiation between the parties *thereto*, shall govern all building construction work at the project site.

2. Exceptions to the above are as follows:

   a. For crafts whose agreements provide them no travel allowance or a travel allowance of less than $2.50 per day, each workman shall be paid a total travel allowance of $2.50 per day.

   b. For crafts whose agreements provide them no payment or payment of less than two (2) hours' show-up time in the event they are not put to work because of weather conditions, each workman shall be paid a total of two (2) hours' show-up time in such event. However, under these circumstances, the employee will be obliged to remain at the site during the two (2) hour period, at the request of the contractor(s), pending possible improvement in the weather.

3. In consideration of the concessions enumerated above, all crafts pledge that there will be no strikes (other than area-wide strikes during contract renewal negotiations), walkouts, or work slow-downs during the life of the project. All crafts agree to accept jurisdictional work assignments as made by the various contractors and to process any disputes therewith as provided in the Procedural Rules and Regulations of the National Joint Board for Settlement of Jurisdictional Disputes, As Amended. (In this connection, it is understood that the various contractors will also conduct themselves in accor-

> dance with said Procedural Rules and Regulations.) It is agreed that any grievances between local union(s) and contractor(s) shall be settled in accordance with the grievance machinery provided in the craft agreement(s) or, if none is so provided, by arbitration." (Emphasis supplied)

Dayton is neither a contractor nor a member of a local union (A. pp. 19, 20, 25; Petition p. 15).

This action was initiated in the United States District Court for the Southern District of Ohio, Western Division by Petitioners seeking to require Dayton to arbitrate alleged grievances under Petitioner's contract with the Associated Contractors of Ohio, Inc., pursuant to the Memorandum of Understanding. Dayton is not a member of the Associated Contractors of Ohio, Inc. (A. pp. 10, 20, 24; Petition p. 14). In denying Petitioner's motion for summary judgment the District Court held that "Dayton did not agree that any dispute between it and a union with respect to anything would be the subject of any grievance or arbitration proceeding. . . . It involves a dispute between Dayton and a labor union--between the owner and the union, as distinguished between the contractor and a union. We simply cannot find anything in the Memorandum of Understanding which constitutes an agreement between the owner and a union working on the project to arbitrate anything." (Petition p. 20.)

Upon Petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, the Court affirmed the judgment in favor of Dayton concluding: "It thus appearing that the unambiguous language of the 'Memorandum of Understanding' militates against the position asserted by appellant, we hold that the district court's order dismissing the complaint was correctly entered, and the judgment in favor of Dayton is, therefore, affirmed." (Petition p. 15.)

ARGUMENT

The decision of the Court of Appeals in affirming the District Court is clearly correct and does not conflict with any decision of this Court.

The sole issue is whether or not the Memorandum of Understanding requires Dayton to arbitrate any dispute with the South Central Ohio Building and Construction Trades Council or any of its members. This Court, in one of the Trilogy decisions, *United Steelworkers* v. *Warren & Gulf Navigation Company*, 363 U.S. 574 (1960) at page 582 stated:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. *For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.*" (Emphasis supplied)

The Courts below decided that there was no *agreement to arbitrate.*

Petitioners place great reliance on the *Flair* decision, *International Union of Operating Engineers, Local 150, AFL-CIO* v. *Flair Buildings*, 406 U.S. 487 (1972). *Flair* is readily distinguishable from this case and in fact supports Respondent's position.

Flair did not dispute that it had agreed to arbitrate "any difference" had with the union. Its position was that the arbitration clause did not require arbitration of the defense of laches which it had raised. The issue before the Court was not, as here, the lack of an agreement to arbitrate.

Furthermore, Flair entered into the agreement in the capacity of contractor and not as an owner. Flair agreed to incorporate the terms and conditions of the master craft

agreement and had agreed to an arbitration clause. However, in this case, the Memorandum of Understanding unequivocally demonstrates that Dayton and the union working on the project did not agree to arbitrate any issue.

This Court, at page 491 of the *Flair* decision stated:

> "Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer *have agreed to arbitration.* That issue, as well as the scope of the arbitration clause, remains a matter for judicial decision." (Emphasis supplied)

See further *Atkinson* v. *Sinclair Refining Company*, 370 U.S. 238 (1962); *Gateway Coal Company* v. *Mine Workers*, 414 U.S. 368 (1974).

The Memorandum of Understanding, clearly calls for arbitration only where a dispute between a *contractor* and a labor organization is involved. Dayton was a party to said Memorandum of Understanding as an *Owner* and not as a contractor. Dayton is neither an employer nor a contractor in its relationship with the Operating Engineers or any of the other craft unions. Dayton has no labor-management contract with the Operating Engineers nor is it the employer of any member of the Operating Engineers or any other craft union. There is no provision in the Memorandum providing for arbitration between Dayton and a union including the Operating Engineers. The final sentence of the Memorandum of Understanding provides:

> "It is agreed that any grievance between *local union(s)* and *contractor(s)* shall be settled in accordance with the grievance machinery provided in the craft agreement(s) or if none is so provided by arbitration." (Emphasis supplied)

The decisions below are manifestly correct and there is no conflict with any other decisions of this Court. Peti-

tioner asserts that to allow the decision of the Court of Appeals to stand in this case "would severely damage the primacy of the arbitrator in labor dispute settlement" (Petition p. 11). However, Petitioners statement presupposes that Respondent has agreed to arbitrate. Arbitration is the primary means of resolving labor disputes *but only where the parties have agreed to arbitrate.* It is this distinction which this Court has consistently recognized as the prerogative of the courts to decide.

CONCLUSION

This Court should deny Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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